

ANNE GOODWIN CRUMP*
VINCENT J. CURTIS, JR.
THOMAS J. DOUGHERTY, JR.
JAMES G. ENNIS
PAUL J. FELDMAN*
RICHARD HILDRETH
EDWARD W. HUMMERS, JR.
FRANK R. JAZZO
BARRY LAMBERGMAN
PATRICIA A. MAHONEY
GEORGE PETRUTSAS
LEONARD R. RAISH
JAMES P. RILEY
MARVIN ROSENBERG
LONNA M. THOMPSON
KATHLEEN VICTORY*
HOWARD M. WEISS
*NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH

ATTORNEYS AT LAW

11th FLOOR, 1300 NORTH 17th STREET

ROSSLYN, VIRGINIA 22209

P. O. BOX 33847

WASHINGTON, D.C. 20033-0847

(703) 812-0400 • (202) 828-5700

TELECOPIER

(703) 812-0486 • (202) 828-5786

PAUL D.P. SPEARMAN
(1936-1982)
FRANK ROBERSON
(1936-1981)

RECEIVED

JUN 28 1993

RETIRED
ROBERT L. ROWELL
EDWARD F. KENEHAN
ROBERT L. HEALD
FRANK J. ROBERSON
CHIEF COUNSEL
EDWARD A. CAINE

TELECOMMUNICATIONS CONSULTANT
HON. ROBERT E. LEE

WRITER'S NUMBER
(703) 812-

0470

June 28, 1993

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Attention: Allocations Branch

RE: MM Docket No. 93-100
RM-8175
Table of FM Allotments
Cleveland and Ebenezer, Mississippi

Dear Mr. Caton:

Transmitted herewith, on behalf of Radio Cleveland, Inc., licensee of WCLD-FM, Cleveland, Mississippi, are an original and four copies of its Reply Comments in the above-captioned proceeding.

Should any questions arise concerning this matter, please

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JUN 28 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b))
Table of FM Allotments)
Cleveland and Ebenezer, Mississippi)

MM Docket No. 93-100
RM-8175

To: Chief, Allocations Branch

REPLY COMMENTS

RADIO CLEVELAND, INC.

Frank R. Jazzo
Fletcher, Heald & Hildreth
1300 North 17th Street
Eleventh Floor
Rosslyn, Virginia 22209

Its Attorney

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SUMMARY

Herein, Radio Cleveland, Inc., licensee of WCLD-FM, Cleveland, Mississippi, shows that Ebenezer, Mississippi, should no longer be considered a community for allotment purposes. Its declining and minute population coupled with its lack of the main indicia of "community" status warrant the channel's deletion. Moreover, the vacant Ebenezer channel clearly does not warrant a Section 307(b) preference over the proposed upgrade of WCLD-FM. The upgraded WCLD-FM will provide new service to significantly more people than would the theoretical service to be provided on the vacant Ebenezer channel. The channel presently has no fully spaced site available and can operate with no more than three kilowatts ERP, thus its potential viability is tenuous, at best. Finally, the expression of interest in the vacant Ebenezer channel by Afro-American Broadcasters of Mississippi ("AABM") should not be credited unless the principal or principals of AABM are identified. To do otherwise, would be to invite abuse of the Commission's processes.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)
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Amendment of Section 73.202(b)) MM Docket No. 93-100
Table of FM Allotments) RM-8175
Cleveland and Ebenezer, Mississippi)

To: Chief, Allocations Branch

REPLY COMMENTS

Radio Cleveland, Inc. ("RCI"), licensee of WCLD-FM, Channel 280A, Cleveland, Mississippi, by its attorney, hereby submits its Reply Comments in the above-captioned proceeding. In support thereof, the following is stated:

I. INTRODUCTION

On April 20, 1993, the Chief of the Allocations Branch released a Notice of Proposed Rule Making, MM Docket No. 93-100, DA 93-366 ("NPRM"), proposing to substitute Channel 280C3 for Channel 280A at Cleveland, Mississippi, and to modify the license of WCLD-FM to specify operation thereon. In addition, the NPRM proposed to delete the vacant Channel 280A allotment at Ebenezer, Mississippi, in order to accommodate the WCLD-FM upgrade.

On June 2, 1993, RCI submitted Comments restating its support for the proposed upgrade of WCLD-FM and the corresponding deletion of the vacant Ebenezer FM channel. On June 11, 1993, an unspecified and unidentified individual, entity or group called

"Afro-American Broadcasters of Mississippi" expressed its intention to file an application for the vacant Ebenezer FM channel upon the opening of a new filing window. While the NPRM stated that a filing window would be opened for the Ebenezer FM channel in the event Comments were filed expressing an interest in filing an application for the channel, RCI urges the Commission to delete the Ebenezer FM channel and upgrade WCLD-FM, despite the expression of interest in the Ebenezer channel. As shown below, the public interest favors the deletion of the Ebenezer channel.

II. Ebenezer No Longer Qualifies As A Community

A review of the evidence indicates that Ebenezer no longer qualifies as a "community" for allotment purposes. It should be noted that JimBar Enterprises, the petitioner for and the only permittee of the Ebenezer channel joined RCI in requesting the deletion of the Ebenezer channel. JimBar Enterprises requested the cancellation of the Ebenezer FM construction permit and stated that the Ebenezer area could not feasibly support a new FM station. The NPRM noted at footnote 3 that the 1992 Rand McNally Commercial Atlas shows Ebenezer as having a population of merely 100 people. This marks a precipitous drop of one-third of Ebenezer's population from the 1982 and 1987 Rand McNally Commercial Atlas listings of 150 people. Ebenezer is essentially becoming a "ghost town". To put Ebenezer's population in perspective, each floor of the FCC's 1919 M Street, Washington, D.C., headquarters has approximately the same number of people as Ebenezer. Surely, no one would argue that each floor of the FCC's headquarters building is entitled to its

own FM station. Ebenezer's drastic population drop in the five year period between 1987 and 1992 would be comparable to a loss in population by the District of Columbia of over 200,000 people on a proportionate basis.

Significantly, the U.S. Census does not maintain population figures for Ebenezer. It is too small. Ebenezer is neither incorporated nor is it a Census Designated Place (CDP). Ebenezer has no local government to speak of. It has no school system or local newspaper. It does have a local volunteer fire department and water association, however, it is not uncommon for sparsely populated rural areas to have such organizations. The fact that Ebenezer has its own post office and zip code standing alone is insufficient to demonstrate community status. See, Rockport, Gregory, Alice and Armstrong, Texas, 67 R.R. 2d 176, 177 (MMB 1989). Ebenezer only has a handful of local businesses and

is some threshold below which a population grouping no longer qualifies as a "community". RCI submits that Ebenezer has fallen below that threshold. Ebenezer is strikingly similar to the Semora, North Carolina case. The Court of Appeals for the District of Columbia Circuit held that the FCC had not justified the allotment of a new FM channel to Semora, even though it had "its own fire department, post office, social club and business". Reeder v. FCC, 865 F. 2d 1298 (D.C. Cir. 1989). As in the case of Semora, Ebenezer has a few of the sorts of establishments that would otherwise be indicative of community status. These establishments, however, appear to serve a wider geographic area than just the narrow two block confines of Ebenezer. The Census Bureau uses a population of 2,500 inhabitants as its cut-off level for rural status. Ebenezer has only one twenty-fifth or four percent of the population above which the Census Bureau no longer considers an area rural.

III. Ebenezer Is Not Entitled To A Section 307(b) Preference Over The WCLD-FM Upgrade

As the Court of Appeals has noted, "even if 'community' status is warranted, that status is by no means dispositive of the next and critical question of whether that 'community' is entitled to a Section 307(b) preference." New South Broadcasting Corp. v. FCC, (D.C. Cir. 1989), 879 F.2d 867, 66 R.R. 2d 1088, 1089, citing Debra Carrigan, 101 FCC 2d 218, 222 (Rev. Bd. 1985). Under the "quiet village" doctrine relied on in New South and other cases, an area with more business establishments, more people, and more schools than Ebenezer was found to be a quiet village even though its

population was approximately twenty-five times that of Ebenezer. See Beacon Broadcasting, 2 FCC Rcd. 3469, 3471, 63 R.R. 2d 794 (1987).

The "quiet village" doctrine does not require that the two proposals in question serve substantially the same areas. In the New South case, the communities were not even in the same state.

As stated previously, Ebenezer has a population of 100, while Cleveland has a 1990 U.S. Census population of 15,384, which is over 150 times larger than Ebenezer's population. WCLD-FM presently serves 40,482 people within its 60 dBu contour. WCLD-FM has a construction permit to increase effective radiated power to six kilowatts. The construction permit facilities would provide service to a total of 49,732. The proposed Class C3 facilities of WCLD-FM would provide service to 76,687 people, or an increase of 36,257 people over WCLD-FM's present facilities. Thus, the proposed WCLD-FM upgrade would enable the station to virtually double the number of people served. The Ebenezer Class A station, on the other hand, would only provide new service to 25,128 people. Thus, the WCLD-FM upgrade would provide new service to nearly fifty percent more people than would be provided new service by the vacant Ebenezer Class A FM. WCLD-FM's Class C3 operation would provide service to an area of 4,797 square kilometers, which is an increase in area serviced of 3,135 square kilometers, or nearly triple the current licensed service area. The Ebenezer FM would only provide new service to an area of 1,838 square kilometers. Since Ebenezer is not entitled to a Section 307(b) preference, the

objectives of Section 307(b) are better served by the WCLD-FM upgrade.

In Ruarch Associates, 56 R.R. 2d 1593, 1595 (Rev. Bd. 1984), the Review Board indicated that it was unaware of any case in which a community with a population of less than 1,000 has received a dispositive Section 307(b) preference in a multi-community Section 307(b) situation. Ebenezer's population is one-tenth of that benchmark. In Beacon Broadcasting, 2 FCC Rcd 3469 (1987), at footnote 6, the full Commission stated:

The burden under a community status issue is thus not to be confused with the burden of establishing entitlement to a dispositive preference under a Section 307(b) issue for proposing to provide a first local transmission outlet. It does not necessarily follow that an applicant will be awarded a preference for proposing to serve a locality to which no existing station is licensed merely because it produces the minimal showing required to establish that the locality qualifies as a "licensable" community. In satisfying a community-status issue, an applicant merely preserves itself from disqualification. A more stringent showing as to the community's distinctiveness or relative significance may have to be made before the applicant will be awarded a dispositive preference for proposing to serve it. (Citations omitted).

It is well established that the FM allotment priorities were not intended to be applied in a rigid and mechanical fashion. See, Anamosa and Iowa City, Iowa, 46 FCC 2d 520, 525 (1974). The Commission instead takes into account the relative sizes and the need of the communities for the requested FM allotment. The Commission has stated that applying the allotment priorities in a strict manner may lead to anomalous results. North Charleston, et

al., South Carolina, 51 R.R. 2d 25, 29 (Pol. & Rul. Div., 1982).

For example, applying the priorities literally:

"... the result would be that any community, even one of only 100 persons, seeking a first channel would automatically succeed in preference to a second channel in a city of 1,000,000 that would bring a second service to 4,000,000 people. Needless to say, we have not followed such a rigid pattern and have taken into account the size of the respective communities and their need for an FM station."

Anamosa and Iowa City, Iowa, supra at 525.

In the instant case, it would indeed take a rigid and mechanical application of the FM allotment priorities to maintain the vacant Ebenezer FM channel for the declining population grouping of 100 people and turn down the essential upgrade of WCLD-FM and the new service it would provide to over 36,000 additional people. Ebenezer should no longer be considered a "community" for

~~the purpose of the FM allotment priorities and it is not a community for the purpose of the FM allotment priorities.~~

declined,

The Commission observed:

...the overall industry figures mask the fact that the outlook for small radio stations, which comprise the bulk of the industry, is particularly bleak.... Of almost 10,000 commercial radio stations nationwide, the top 50 revenue producing stations, .5 percent of all stations, accounted for more than 11 percent of total radio revenue in 1990 and an estimated 50 percent of total industry profit [footnote omitted]. At the same time, more than half of all stations, primarily those with less than \$1 million in sales, lost money.

Multiple Ownership Report and Order, ¶ 9 (footnotes omitted; emphasis added).

Former Chairman Sikes has recognized that. in these

Similarly, Chairman Quello, in an address to the Federal Communications Bar Association on September 19, 1991, recognized the economic plight of radio broadcasters in the United States, and the need for Commission action to avert an even greater deterioration. Commissioner Quello noted, among other things, that the advent of digital audio broadcasting "presents a potential problem of diluting an already over-saturated radio marketplace."

is losing better than \$150,000 a year. Why? Largely because market fragmentation and increased competition are creating a feeding frenzy for too little food.... One American radio executive recently described the industry as 'drowning in diversity.' And so, in response to this first tidal force ... a steep increase in the number of stations ... the FCC now finds itself urged to reconsider its approach to further broadcast expansion.³

Maintaining the vacant Ebenezer channel would simply weaken the financial viability of other stations in its area, as well as WCLD-FM. The "more is always better" philosophy that was the basis for the allotment policies of Docket 80-90 have been denounced as a mistake by Mass Media Bureau Chief Roy Stewart at two panels at the NAB Radio convention last September in New Orleans. The instant proceeding presents the opportunity to strengthen an existing broadcast service that is currently serving its area well and to eliminate a channel that probably will never be financially viable and will have a detrimental economic impact on existing service in its area. That opportunity should be seized.

IV. The Ebenezer Channel Suffers From Technical Problems and the Expression of Interest Should Not Be Credited

As shown in the attached Engineering Statement of Owl Engineering, Inc., there is now no site location available for the Ebenezer channel that meets the mileage separation requirements of Section 73.207 of the FCC's Rules and the principal community coverage of Section 73.315 of the FCC's Rules. Arguably, the channel may be subject to the grandfathering provisions of Section 73.213(c) of the FCC's Rules, however, full protection must be afforded to both WCLD-FM's licensed and authorized facilities.

³ Id. at page 4.

Thus, site availability should be fairly restricted and the Ebenezer channel would be limited to an effective radiated power of no more than three kilowatts. Therefore the potential viability of an FM station on Channel 280A at Ebenezer is even further diminished.

The "Comments and Expression of Interest" of Afro-American Broadcasters of Mississippi ("AABM") should not be credited. There is no indication as to whether AABM is an individual, a partnership, a corporation or some other form of organization. Thus, there is no way of ascertaining whether AABM is even qualified to file an application for the vacant Ebenezer channel. Permitting AABM to thwart the WCLD-FM upgrade simply by having his/her/its/their (?) attorney file a two page pleading is fraught with great potential for abuse of the Commission's processes. Without identification of the individual or individuals behind AABM there is no way of ascertaining whether AABM's expression is sincere or is simply intended to block improved service by WCLD-FM and the concomitant increased competition. At a minimum, the Commission should require AABM to identify its principal or principals before further considering his/her/its/their (?) expression of interest.

V. Conclusion

Herein, RCI has shown that Ebenezer should no longer be considered a community for allotment purposes. Its declining and minute population coupled with its lack of the main indicia of "community" status warrant the channel's deletion. Moreover, the

vacant Ebenezer channel clearly does not warrant a Section 307(b)



OWL ENGINEERING, INC.

CONSULTING COMMUNICATIONS ENGINEERS

1306 W. County Road F, St. Paul, MN 55112
(612) 631-1338 • Fax (612) 631-3502

**ENGINEERING STATEMENT
ON BEHALF OF RADIO CLEVELAND, INC.
IN SUPPORT OF REPLY COMMENTS
AMENDMENT OF THE FM TABLE OF ALLOTMENTS
CHANNEL 280C3 CLEVELAND, MISSISSIPPI**

June 25, 1993

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**ENGINEERING STATEMENT
ON BEHALF OF RADIO CLEVELAND, INC.
IN SUPPORT OF REPLY COMMENTS
AMENDMENT OF THE FM TABLE OF ALLOTMENTS
CHANNEL 280C3 CLEVELAND, MISSISSIPPI**

Owl Engineering, Inc. has been retained by Radio Cleveland, Inc. (hereafter "RCI") to prepare this Engineering Statement in support of reply comments regarding the Notice of Proposed Rule Making; MM Docket No. 93-100.

Cleveland has proposed amending the FM table of allotments, FCC Rule Section 73.202 as follows:

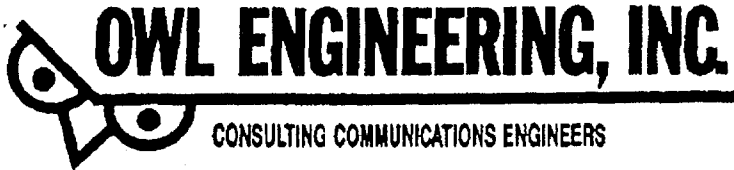
<u>Location</u>	<u>Present</u>	<u>Proposed</u>
Cleveland, MS	280A 224A,252C3	280C3 224A,252C3
Ebenezer, MS	280A	

The reference coordinates used for this study are:

Cleveland, MS (Class A)
33 44' 01" North Latitude
90 42' 50" West Longitude

Cleveland, MS (Class C3)
33 43' 59" North Latitude
90 41' 38" West Longitude

Ebenezer, MS
32 53' 13" North Latitude
90 11' 38" West Longitude



OWL ENGINEERING, INC.

CONSULTING COMMUNICATIONS ENGINEERS

1306 W. County Road F, St. Paul, MN 55112
(612) 631-1338 • Fax (612) 631-3502

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IN SUPPORT OF REPLY COMMENTS
AMENDMENT OF THE FM TABLE OF ALLOTMENTS
CHANNEL 280C3 CLEVELAND, MISSISSIPPI**

A comparison of the two mutually exclusive proposals at Cleveland and Ebenezer was completed to determine the service benefit of each proposal.

A population count within the predicted 60 dBu contour of the proposed stations at Cleveland and Ebenezer was completed. The distance to the 60 dBu contour for the Class A facility at Cleveland was based on the licensed power of 3 KW and height of 91 meters. The distance to the 60 dBu contour for the Class C3 proposal at Cleveland was calculated assuming a maximized facility. The distance to the 60 dBu contour for the Class A proposal at Ebenezer was calculated as a grandfathered station at 3 KW at 100 meters (please see



OWL ENGINEERING, INC.

CONSULTING COMMUNICATIONS ENGINEERS

1306 W. County Road F, St. Paul, MN 55112
(612) 631-1338 • Fax (612) 631-3502

**ENGINEERING STATEMENT
ON BEHALF OF RADIO CLEVELAND, INC.
IN SUPPORT OF REPLY COMMENTS**

STATEMENT OF THE ENGINEER OF ALL OTHERS



OWL ENGINEERING, INC.

CONSULTING COMMUNICATIONS ENGINEERS

1306 W. County Road F, St. Paul, MN 55112
(612) 631-1338 • Fax (612) 631-3502

**ENGINEERING STATEMENT
ON BEHALF OF RADIO CLEVELAND, INC.
IN SUPPORT OF REPLY COMMENTS
AMENDMENT OF THE FM TABLE OF ALLOTMENTS
CHANNEL 280C3 CLEVELAND, MISSISSIPPI**

AFFIDAVIT

RAMSEY COUNTY

)

STATE OF MINNESOTA

)

ss:

Garrett G. Lyslak, being first duly sworn, says that he is president of Owl Engineering, Inc., consulting communications engineers with offices in Arden Hills.



OWL ENGINEERING, INC.

CONSULTING COMMUNICATIONS ENGINEERS

1306 W. County Road F, St. Paul, MN 55112
(612) 631-1338 • Fax (612) 631-3502

ENGINEERING EXHIBIT E-1

FM channel 280-A

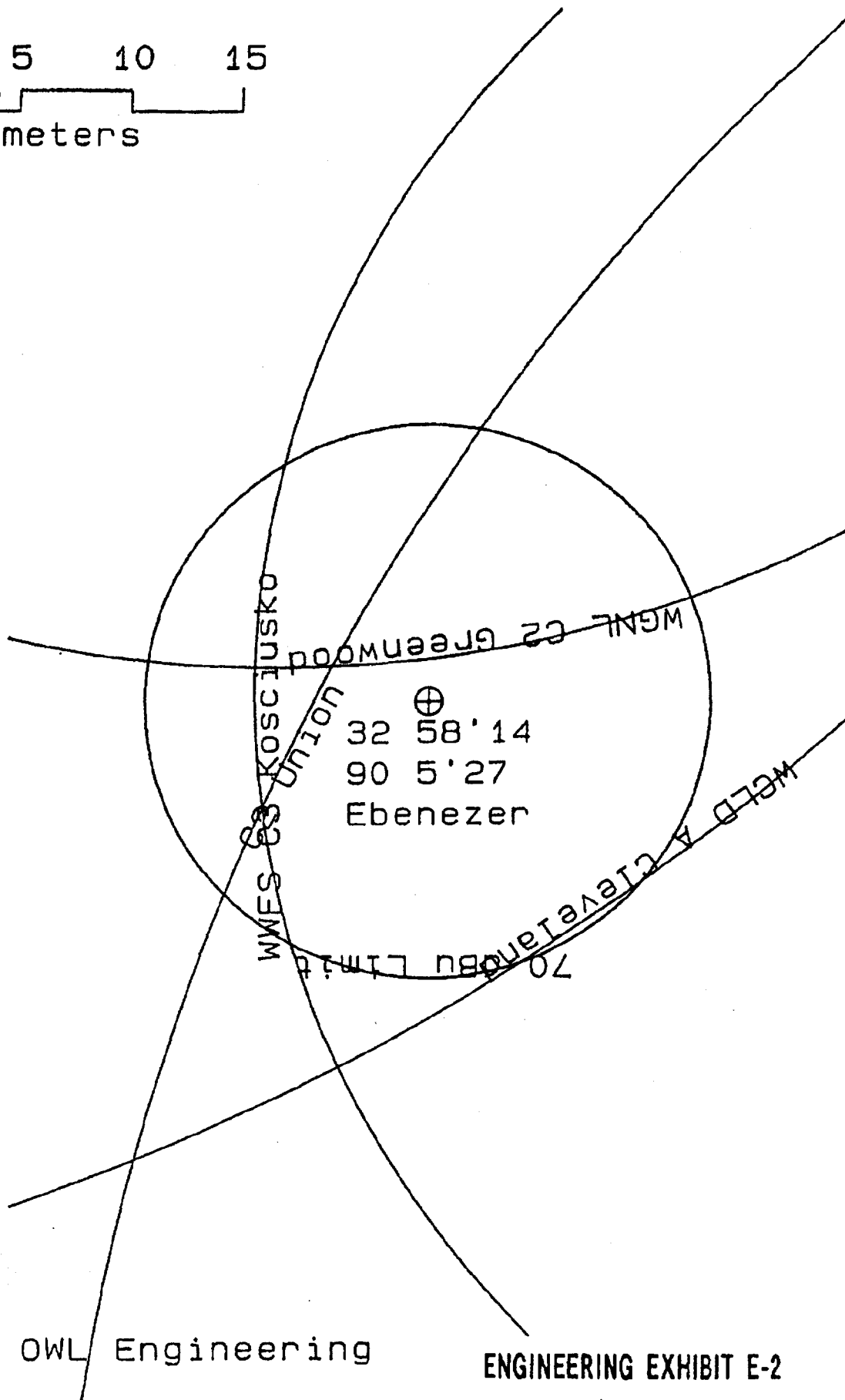
Ebenezer, MS

LATITUDE: 32 58' 14"

LONGITUDE: 90 5' 27"

CHNL	Call	City	Class	Calculated Km.	Required Km.	Clear- ance	Bearing
226		NO CONFLICT					
227		NO CONFLICT					
277	WFPS	FMMS Kosciusko	C3	34.15	42	-7.85	89.23
278		NO CONFLICT					
280	WCLDFM	FMMS Cleveland	A	102.59	115	-12.41	325.87
280	WCLDFM	FRMS Cleveland	C3	101.50	142	-40.50	326.71
281	NEW	FMMS Union	C2	101.36	106	-4.64	119.00
282	WGNL	FRMS Greenwood	C2	56.92	55	1.92	353.57
282	WGNL	FMMS Greenwood	C3	46.25	42	4.25	341.43
283		NO CONFLICT					

0 5 10 15
Kilometers



CERTIFICATE OF SERVICE

I, Roberta Wadsworth, a secretary in the law firm of Fletcher, Heald & Hildreth, do hereby certify that true copies of the foregoing "Reply Comments" were sent this 28th day of June, 1993, by first-class United States mail, postage prepaid, to the following:

Jerrold D. Miller, Esquire
Miller & Miller, P.C.
Post Office Box 33003
Washington, DC 20033
Counsel for Afro-American Broadcasters
of Mississippi


Roberta Wadsworth

*Denotes By Hand